Office - Supreme Court, U.S.
FILED
SEP [illegible]
ALEXANDER L. STEVAS,
CLERK

No. 81-2392

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PHILLIPS PETROLEUM COMPANY,

Petitioner,

v.

EDDIE C. SAUCEDO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

ANDREW S. HANEN*
FRED KNAPP, JR.
ALFRED H. ERRET, JR.

Andrews & Kurth
4200 Texas Commerce Tower
Houston, Texas 77002
(713) 220-4200

EUGENE C. MARSHALL
Phillips Petroleum Company
Houston, Texas

KENNETH HEADY
C. J. ROBERTS
Phillips Petroleum Company
Bartlesville, Oklahoma

Attorneys for Petitioner, Phillips Petroleum Company

* Counsel of Record

Boone of Houston, Inc. Printed in U.S.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES 1

I. REPLY TO RESPONDENT'S STATEMENT OF THE CASE 1

II. REPLY TO RESPONDENT'S SUMMARY OF THE ARGUMENT AND ARGUMENT 3

III. CONCLUSION 5

TABLE OF AUTHORITIES

Cases

Erie R. Co. v. *Tompkins*, 304 U.S. 34 (1938) 3, 5

Scurlock Oil Company v. *Birchfield*, 630 S.W. 2d 674 (Tex. Civ. App. – Houston [1st Dist.] 1981, no writ) 1, 4, 5

Treatises

31 A.L.R. 2d 1375 (1953) 5

No. 81-2392

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PHILLIPS PETROLEUM COMPANY,

Petitioner,

v.

EDDIE C. SAUCEDO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PHILLIPS PETROLEUM COMPANY

I.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent ("Saucedo") makes several assertions in his statement of the case which are contrary to both fact and law. Further, he does not cite one event in his statement of the case, nor one case or legal precedent in his response to Phillips Petroleum Company's ("Phillips") petition, that bears on the uncontroverted fact that the courts below erred in interpreting Texas law [*See Scurlock Oil Company* v. *Birchfield*, 630 S.W.2d 674 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ)], erred by overruling prior Fifth Circuit cases which were decided in Phillips' favor, and erred by not even considering a dispositive and

universally recognized rule of law. These errors, when combined with certain statutory provisions of the State of Texas, serve to deprive Phillips of the right to due process guaranteed to Phillips under the Constitution of the United States and the decisions of this Court.

In his statement of the case, Saucedo concludes, without any factual basis that Phillips was "charged with the knowledge of the contents" of a National Transportation Safety Board ("NTSB") report and was therefore liable in this incident. (Saucedo's Brief pp. 2, 3). As the record clearly indicates, however, that report was directed at a different accident — one resulting from a different cause, some twenty months before and hundreds of miles away from the one in question in this suit (S.F. 731). Furthermore, testimony revealed, that after that accident, but before the incident here in question, over 50 miles of new pipe were laid and the NTSB approved all of the work (S.F. 731). To construe the NTSB report, then, as meaning that the entire pipe line was structurally deficient, not only at the time of the earlier accident, but for all times thereafter, despite the upgrading of the pipe line, simply flies in the face of reality.

To further construe the NTSB report, as Saucedo attempts to, to mean that every shipper, once aware of one pipe line accident, is liable for all future accidents, has no foundation in law. While accidents on pipe lines happen for a variety of reasons, many of these causes have nothing to do with the shipper of the gas. Is every shipper then simply "charged" with knowledge of th se accidents, and thereby held liable? Not surprisingly, Saucedo cites no case or statute which demands such an untenable conclusion.

Saucedo's second erroneous conclusion, that Phillips' liability can be based upon *actual* knowledge of alleged inadequacies in the pipe line, is also without foundation in

fact (Saucedo's Brief p. 3). A fair reading of the record reveals that the pipe line's leak record compares favorably with that of other pipe lines (S.F. 310, 728); that the pipe line has had less leaks per thousand miles of line than the national average for pipe lines (S.F. 728); and that even Saucedo's witness, the sole source for the trial court's erroneous ruling that the entire pipe line was unsafe, agreed that the pipe line's leak record covering the area in question was excellent (S.F. 526-527).

II.

REPLY TO RESPONDENT'S SUMMARY OF THE ARGUMENT AND ARGUMENT

Saucedo contends that Phillips failed to properly assert reasons for the granting of a Writ of Certiorari. This contention is, of course, entirely false. Phillips has maintained that the trial court failed to follow the constraints of *Erie R. Co.* v. *Tompkins*, 304 U.S. 34 (1938), ever since that court entered judgment. Phillips reasserted this allegation at every available level and *no federal court yet has applied what is clearly the law in Texas.* Additionally, the opinion and judgment of the Fifth Circuit conflicts with its own prior decisions and creates a heretofore unheard of standard of care which it has forced upon Phillips. Phillips timely complained of these errors and continued to timely raise these errors at every opportunity. Saucedo's attempts to imply that Phillips has not preserved these points are without merit.

Saucedo's assertion that this appeal was made simply for delay is completely false and is offensive to counsel of record for Phillips. Phillips appealed because both of the lower federal courts, sitting in diversity, have refused to decide this case as a Texas state court would have decided it. Phillips based this argument on several theories, but two

of the primary arguments are (and always have been) that it owed no duty because of the fact that Saucedo was a repairman *and* that under Texas law, no proximate cause existed. Under well-settled principles of Texas law, no judgment against Phillips would be proper, even assuming a factual finding of negligence.

Saucedo himself has judicially admitted that Phillips' position on the law is correct. In his Respondent's brief, he states that this Court ought to ignore *Scurlock Oil Company* v. *Birchfield, supra,* because it does not deal with the repairman defense. Saucedo then concedes:

> Instead the [*Scurlock*] court held that the *plaintiff's injury was not, as a matter of law, foreseeable so that defendant's negligence could not have been a proximate cause of his damages.* (Emphasis added.) (Saucedo's Brief p. 7)

This is precisely the point that Phillips has been making since the inception of this case. Saucedo has finally recognized that even conceding a factual finding of proximate cause, *as a matter of Texas law,* no proximate cause exists. It could not exist under Texas law in *Scurlock* and the Fifth Circuit's failure to follow *Scurlock* in the present case violates the *Erie* doctrine. Saucedo makes no attempt to try to distinguish *Scurlock* either factually or legally. This is because the instant case and *Scurlock* are indistinguishable.

Lastly, Saucedo lamely claims that the "repairman defense" has been overruled or should not be applied. He cites no Texas law in support of this stance. Texas has *never* overruled the repairman defense, nor has it limited the defense to owners of property. The rationale of the "repairman" defense is even stronger when the alleged tortfeasor is not the owner of the property, but is instead

a third party. Saucedo's reference to the annotations collected in 31 *A.L.R.* 2d 1375 (1953), as supporting a limitation of the defense to only the owners of property, is misleading and inaccurate.

III.

CONCLUSION

Phillips has been to two different levels of the federal judicial system and has yet to have a court determine this case as would a Texas state court. *Erie R. Co.* v. *Tompkins, supra,* demands this outcome, yet Phillips has been denied the protection of *Erie.* Saucedo concedes that the law in Texas, as espoused in *Scurlock Oil Company* v. *Birchfield, supra,* would hold that, as a matter of Texas law, no proximate cause exists. Phillips has always maintained this position and the federal courts are bound to follow this law.

Phillips is a victim of forum shopping in its most basic form. If this case had been filed in state court, Phillips would have won as a matter of law. This inequity should not be allowed to stand. The petition for a Writ of Certiorari should be granted and the judgments of the Fifth Circuit and the District Court should be reversed.

Respectfully submitted,

ANDREW S. HANEN*
FRED KNAPP, JR.
ALFRED H. EBERT, JR.

Andrews & Kurth
4200 Texas Commerce Tower
Houston, Texas 77002
(713) 220-4200

EUGENE C. MARSHALL

Phillips Petroleum Company
Houston, Texas

KENNETH HEADY
C. J. ROBERTS

Phillips Petroleum Company
Bartlesville, Oklahoma

Attorneys for Petitioner, Phillips Petroleum Company

* Counsel of Record